

Teaming Agreements & Joint Ventures: Building Successful Contracting Teams

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Subcontracting and Teaming Agreements

- Teaming Agreements
 - Letters of Intent and Nondisclosure Agreements
 - Government Recognition of Teaming Agreements
 - Enforceability of Teaming Agreements
- Subcontracting under the Federal Acquisition Regulation
 - From the Prime Contractor's Perspective
 - From the Subcontractor's Perspective
 - Contracts for Commercial Items

Teaming Agreements

- Why do it?
 - To compete for a contract that requires technical, financial or other capabilities you do not possess
 - To “lock in” a proposal team member early in the contract formation process
 - To facilitate early preparation of a proposal with a significant subcontracting element
 - To achieve a responsive proposal, including meeting socio-economic requirements for contracting with small businesses
 - To ensure partner has the technical, financial, and past performance history required to perform

Teaming Agreements

- Common way to combine resources to compete for a contract
- “Two or more companies form a partnership or joint venture to act as a potential prime contractor; or . . . [a] potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.” FAR § 9.601

Teaming Agreements

- Common elements
 - Preliminary recitations of the skills, experience and backgrounds of the parties and the nature of the procurement for which they will compete;
 - Express limitation on the scope of the agreement – not intended to be a formal joint venture or partnership;
 - General description of the nature of the work each party will be responsible for during proposal preparation and, if awarded the contract, during performance;

Teaming Agreements

- Common elements - continued
 - Non-competition and level of effort clauses tailored to promote a degree of trust and commitment; and
 - Terms and conditions addressing
 - allocation of costs during proposal preparation,
 - the use of and non-disclosure of each parties' proprietary data,
 - termination of the agreement, and
 - other clauses necessary to express and limit the nature and extent of the agreement.

Letters of Intent and Nondisclosure Agreements

- Letter of Intent:
 - A document “used to establish preliminary understandings of parties that intend to enter into a contract at a later date.” Black’s Law Dictionary 924 (8th ed. 2004)
 - Ordinarily does not include an exchange of promises necessary to form a binding contract
 - May be binding if court finds it was meant to create a binding contract AND has necessary terms

Letters of Intent and Nondisclosure Agreements

- Letter of Intent
 - Used to:
 - Define responsibilities leading up to signing of the teaming agreement
 - What steps each of the parties will take
 - What role each will play
 - Establish procedures for information exchange and discussions regarding capabilities

Letters of Intent and Nondisclosure Agreements

- Proprietary Data Nondisclosure Agreement
 - What it is
 - ESSENTIAL
 - A binding agreement defining proprietary data and the limits on its use by the parties and disclosure to third parties.
 - Why?
 - Protect data without fear of losing trade secret protection or risking public disclosure
 - Relationship building
 - Planning

Government Recognition of Teaming Agreements

“The Government will recognize the integrity and validity of contractor team arrangements; *provided*, the arrangements are identified and company relationships are fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective. The Government will not normally require or encourage the dissolution of contractor team arrangements.” FAR § 9.603

Government Recognition of Teaming Agreements

- First Step: Disclosure to Government
- Government reservation of rights (FAR § 9.604)
 - Require consent to subcontracts
 - Determine the responsibility of the prime contractor under subpart 9.1, on the basis of the stated teaming arrangement
 - Provide the prime contractor data rights owned or controlled by the government
 - Enforce policy on competitive subcontracting at any time during contract performance
 - Look to the prime contractor as the party fully responsible for contract performance, notwithstanding any teaming arrangement

Enforceability of Teaming Agreements

- A contract is, “a mutually binding legal relationship obligating the seller to furnish the supplies or services ... and the buyer to pay for them.” FAR § 2.101.
- A “meeting of the minds”
 - Mutual agreement
 - To the basic terms of the contract
 - Price
 - Subject matter
 - Delivery Schedule

Enforceability of Teaming Agreements

- Teaming agreements generally not intended to be a binding contract between the parties.
 - Forward looking and general – not likely to be a contract
 - Detailed as to terms of payment, performance, and timelines – may be a contract
- Druar v. Ellerbee & Co., 222 Minn. 383, 24 N.W. 2d 820 (1946): Agreement to pursue military construction contracts unenforceable

Enforceability of Teaming Agreements

- Teaming agreements may be construed as a binding contract between the parties
- EG&G Technical Services v. Cube Corporation, Fairfax County, VA: small business prime bound to contract with large sub for Navy baseops contract
- Intent to bind the parties for Contract formation in Virginia:
 - (1) Scope of the work to be performed
 - (2) the compensation to be paid
 - (3) the terms of the agreement = Intent to enter into a contract

Enforceability of Teaming Agreements

- Terms **suggesting** an intent to form a contract:
 - Express statements that one party will be awarded a subcontract if the other party wins the prime contract
 - Specific divisions of the work under the prime contract, especially if stated in percentages of work or elements of work;
 - Specific provisions regarding the price of the work to be performed by the subcontracting member; and
 - Detailed terms and conditions, especially those related to the expected prime contract

Enforceability of Teaming Agreements

- Terms arguing **against** creation of a contract:
 - Explicit statements that the teaming agreement is not a binding subcontract between the parties;
 - General descriptions of the division of work between teaming members;
 - General statements that the parties will seek to agree on a price and other elements of the work
 - Absence of detailed terms and conditions, relying instead on general principles to guide negotiation

Special Consideration Teaming Agreements

SDVOSB Teaming Agreements

- Meeting the size standards where joint venture members are SBs:
 - Procurement for more than 1/2 of Revenue-based NAICS standard contract - all SB JV's are small
 - Procurement for more than \$10 on employee-based NAICS standard contract - all SB JV's are small
 - For “smaller” contracts - SB JV must be small
- Subcontract teaming arrangements:
 - FAR § 52.219-27: SDVOSB prime must perform 50% of the work, and
 - FAR § 19102(f): non-manufacturers may supply the product of another small business

Special Consideration Teaming Agreements

SDVOSB Teaming Agreements

- JV eligibility for set-asides and sole source awards Under Public Law 108-183:
 - JV Agreement must include:
 - Statement of purpose identifying the solicitation
 - Designation of SDVOSB as managing member
 - Commitment of at least 51% of net profit to SDVOSB member
 - Statement of responsibilities - SDVOSB negotiates with Gov
 - Statement that each member fully responsible for performance
 - Statement that contract records remain with SDVOSB manager
 - JVA must qualify at time of bid - cannot modify JV agreements after award!

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Subcontracting: Prime Contractor's Perspective

- Contracting with the Government
 - Christian Doctrine: If the government fails to include a “mandatory” clause in a government contract, the court will read the clause into the contract
 - Examples:
 - Equal Opportunity Clause
 - Buy America Act
 - Disputes Clause
 - Termination for Convenience Clause
 - Changes Clause

Subcontracting: Prime Contractor's Perspective

- How do FAR clauses impact a prime contractor's negotiations with subcontractors?
 - Rules governing required clauses in prime contracts do not apply to subcontractors (no Christian Doctrine)
 - FAR contracting involves three types of subcontract clauses:
 - Mandatory Flow Down Clause
 - Advisory Clause
 - Negotiable Clause

Subcontracting: Prime Contractor's Perspective

- **Mandatory Flow Down Clauses**
 - Language in prime contract that must be included in subcontracts
 - Usually reserved for public policy purposes (Equal Opportunity Clause)
 - Occasionally limited to specific types of contracts or only contracts of a certain value
 - Failing to include within sub-contracts is a breach of the prime contract
- **Advisory Clauses**
- **Negotiable Clauses**

Subcontracting: Prime Contractor's Perspective

- Mandatory Flow Down Clauses
- Advisory Clauses
 - Not required by FAR to be used in subcontracts
 - Necessary to protect interests of the prime contractor
 - Termination for Convenience of the Government Clause
 - Changes Clause
- Negotiable clauses
 - Not mandatory or necessary
 - Situational usage, discretionary clauses

Subcontracting: Subcontractor's Perspective

- Analyzing clauses according to class
 - Mandatory Flow Down Clauses
 - Required by FAR – deal breakers
 - Advisory Clauses
 - Legitimate clauses necessary to protect prime contractor's interests - Changes Clause, T4C
 - Ensure they are part of prime contract
 - Modify clause to only protect prime's interests

Subcontracting: Subcontractor's Perspective

- Analyzing clauses according to class.
 - Other clauses
 - Prime Contractor often over inclusive in use of FAR clauses
 - Conservative approach – include it all
 - Transaction costs of individual contract terms
 - At a minimum - carefully examine and understand compliance costs, if any

Commercial Item Contracts

- Commercial Items:

“Any item, [including services] other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes” FAR § 2.101

Commercial Item Contracts

- Should resemble customary commercial practices (Part 12 of FAR)
- FAR § 52.212-4 - Contract Terms and Conditions Commercial Items
 - Primary source of contract clauses
 - These clauses may be tailored to comply with commercial practices (FAR § 12.302)
 - Unless the terms deal with: assignments, disputes, contract payments and invoices, and compliance with laws unique to federal government contracts, including the Procurement Integrity Act and the Anti-Kickback Act

Commercial Item Contracts

- Mandatory Flow Downs (FAR § 52.244-6)
 - ***Contractor Code of Business Ethics and Conduct***
 - Utilization of Small Business
 - Equal Opportunity
 - Equal Opportunity for Special Disabled Vets, Vets of the Vietnam Era, and Other Eligible Vets
 - Affirmative Action for Workers with Disabilities
 - Notification of Employee Rights Concerning Payment of Union Dues or Fees
 - Preference for Privately Owned U.S.-Flag Commercial Vessels.

Commercial Item Contracts

- Mandatory Clauses (FAR § 52.244-6)

Additionally, “[w]hile not required, the Contractor may flow down to subcontracts for commercial items a minimal number of additional clauses ***necessary to satisfy its contractual obligations.***”

Subcontracting Summary

- Be aware of different types of clauses:
 - Mandatory, Advisory, Negotiable
 - Tailor non-mandatory subcontract clauses
- Be aware of commercial item rules:
 - Few mandatory clauses
 - Flow downs should be limited to those ***necessary to satisfy prime's contractual obligations***

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Tips & Traps

- Teaming agreement may impact protests:
 - *Gentex Corp. v U.S.*, 61 Fed. Cl. 49 (2004):
Successful protestor not entitled to recover subcontractor's costs of bidding where each agreed to bear its own costs
 - *Eagle Design & Management, Inc. v. U.S.*, 62 Fed. Cl. 106 (2004)
Team members/joint venturers may have standing to protest, prospective subcontractors do not

Tips & Traps

- Teaming Agreements may raise antitrust issues
 - Cannot team to eliminate competition intentionally
 - Teams that reduce competition subject to scrutiny
 - Seek legal counsel before teaming with potential competitors
- Teaming may increase competition by creating a new viable challenger

Tips & Traps

- *Trianco, LLC v. IBM, Corp.*, 466 F. Supp. 2d 600 (E.D. Pa. 2006)
 - TA for commissary cash register contract
 - TA did not include objective way to determine subcontract price
 - IBM not required to award subcontract at proposal price
- If Teaming Agreement unenforceable, court may require good faith negotiation of subcontract, “*tabula rasa*”

Tips & Traps

- *Burns & Roe Services Corp.*, Comp. Gen. Dec. B-291530, 2004
 - Best value base operations procurement
 - Team 1: \$92.1 million, “Good (minus)”
 - Team 2: \$92.2 million, “Good”
 - Debrief: “Minus” = failure to meet small biz goals
 - GAO: Navy unreasonably failed to consider Team 1 small biz team member – requiring re-solicitation
- Teaming can help ***win*** small business procurements

Tips & Traps

- *DCMS-ISA, Inc. v. United States, C of FC, 2008 WL 4941817 (Fed. Cl. Nov. 14, 2008)*
 - SDVOSB Set-Aside Procurement
 - Prime must perform 50% of security guard services
 - Proposals had teaming agreement **for all services**
 - SSA cancelled solicitation: high performance risk
 - Upheld: citing detailed D&F and FAR § 9.604(e)
- Teaming can help **lose** small business procurements